

**COMMUNICATIONS
ALLIANCE LTD**



Regulator Performance Guide Draft
COMMUNICATIONS ALLIANCE SUBMISSION
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CONTENTS

INTRODUCTION	2
PRINCIPLE 1: CONTINUOUS IMPROVEMENT AND BUILDING TRUST	3
Overall	3
Accountability and Continuous improvement	3
Regulatory rationalisation	3
PRINCIPLE 2: RISK-BASED AND DATA-DRIVEN	4
PRINCIPLE 3: COLLABORATION AND ENGAGEMENT	5
OTHER ELEMENTS OF THE PERFORMANCE FRAMEWORK	5
Performance reporting	5
Ministerial Statements of Expectations and Regulator Statements of Intent	5
Implementation	6

INTRODUCTION

Communications Alliance welcomes the opportunity to provide this submission in response to the Department of Prime Minister and Cabinet's consultation on the Draft Regulator Performance Guide.

We strongly support the activities of the Deregulation Agenda, and are pleased to be able to offer our comments, informed by the telecommunications industry's interactions with numerous regulators.

We have offered some specific comments in our submission, only focusing on areas where we view there could be some useful changes to the framework and draft put forward. We would be pleased to have further discussions on this topic if there are any questions.

Overall, we support what has been put forward, but would like to further understand how the Guide will be implemented and performance verified.

Additionally, while Principle 3 (Collaboration and Engagement) is important as a standalone principle, it should also be the key foundation for the other principles, and that should be made clear at the beginning of the Guide. Regulators should collaborate with regulated entities when first determining how this Guide should specifically be implemented for them, including performance indicators and measurements for each Principle.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

PRINCIPLE 1: CONTINUOUS IMPROVEMENT AND BUILDING TRUST

Overall

Considering the importance of some of the matters included in this Principle, we consider it appears too broad for practicality and clarity and may be better broken down into two principles:

- Accountability and continuous improvement, capturing the accountability, review, and staff capability points.
- Regulatory rationalisation, capturing the commitment to taking a broad regulatory perspective, identifying and minimising duplication and harmonising activities.

Our following comments are based on that proposed division.

Accountability and Continuous improvement

The points covered in the Draft guide on this area are largely agreeable. We do have the following specific suggestions:

- For performance indicators and measures, it would be helpful to use a survey – developed in conjunction with the regulated parties – to gain a 360 perspective on the regulator’s performance.
- There should also be accountability to consumers protected or impacted by that regulator, with KPIs on consumer education on their rights and entitlements.
- Staff capability is mentioned in the draft guide, but we consider it should have a more prominent role and should form a key part of this principle. Many regulators in Australia work in technical or complex spaces, and overall regulatory staff should have a strong grasp of business practices and operations, in addition to the broader landscape in which businesses must operate.
- The idea of taking “a broad perspective of the regulatory environment” should also be split across these two principles. We agree that regulators should “consider best practice examples from other jurisdictions,” and that aspect of the broad perspective should be included under the Accountability and Continuous Improvement principle.

Regulatory rationalisation

We strongly support the proposal for regulators to work further on rationalisation and to clarify their scopes. We view that this principle would capture 2 key points from Principle 1 in the draft guide:

- Identify and minimise duplication and harmonise activities
- Take a broad perspective of the regulatory environment – in this case, that would be understanding the full picture of legal obligations that impact regulated parties, including business and employment laws, and (for example in telco), consumer and national security obligations.

In particular, we would like to see an emphasis on the need to establish clear scopes for each regulator, that do not overlap, and KPIs around ongoing communication with both

relevant regulators and Departments. Those KPIs should be 'outcomes based' as mentioned in the Guide, which would include taking into consideration feedback from regulated parties (and not, for example, the number of meetings held).

Telecommunications providers have recently seen the importance of open communication and clear scopes in the overlapping consultations driven by the ACMA, ACCC and Department of Infrastructure, Transport, Regional Development and Communications (DITRDC). In November 2020, the ACMA opened a consultation on [Proposed service standards for superfast fixed broadband services](#). Our [submission](#) to this consultation raised concerns about the overlap with the ACCC's work on nbn's Wholesale Broadband Agreement (WBA4). Following the consultation period, the ACMA informed us that they were halting this process as DITRDC would be [consulting on standards, rules and benchmarks for statutory infrastructure providers \(SIPs\)](#) – which also had significant overlap with the ACMA's consultation and the WBA4. Each of these consultations require significant time and resources from industry. Streamlining the process through clear coordination and/or delineation of scopes would have saved time and resources for Government and industry, and would have made it easier to design a clear and efficient structure that takes into account all of these activities.

This experience occurred despite the ACMA and ACCC's recent work to coordinate more closely – which we do greatly appreciate – including having Commissioners/Authority members who sit on both bodies. This underlines the need for continued work on written, clear and transparent scopes for regulators and ongoing communication between all parties.

PRINCIPLE 2: RISK-BASED AND DATA-DRIVEN

We agree with this principle, in particular the concept of proportionality.

We would recommend the Guide include more focus on context in considering data and evidence and determining priorities. While data and evidence is necessary, there also needs to be strong knowledge of the industry being regulated to create appropriate context in prioritisation. For example, a data point may be that there is a 100% growth in complaints about a specific topic – however, if the context is that there were 5 complaints the year prior and 10 complaints this year, in an industry with millions of services, choosing to focus on the 100% increase would not be 'proportionate.'

We also support an outcomes-based approach for regulators and the need for regulators to remain flexible and adapt to changes in technology in a way that supports innovation. In fact, we would recommend a case study or further guidance on this specific goal, as it is of increasing importance due to the pace of technological change. On this note, the case study on principle 2 appears that it may be more relevant to 'continuous improvement,' in that it relates to the operations of the regulator and not their decision-making on strategic application of regulations.

We also support the flexible and outcomes-based approach discussed in the Guide, but would like to see clearer ties to the Office of Best Practice Regulation's guides on developing regulation. How a regulator goes about developing regulation is ultimately an underlying factor in their performance, as it impacts the efficiency, effectiveness and clarity of those regulations. An additional approach should be added to the dot points in under Principle 2, as follows: "Ensure new or revised regulations also align with this principle, including using outcomes-based drafting to support innovation."

Along those lines, we would also recommend a KPI on tracking the number and significance of regulatory instances that are considered to have prevented innovation or otherwise unnecessarily slowed or created a road-block to a new business model or other growth in the regulated industry, informed by ongoing feedback from the impacted parties.

PRINCIPLE 3: COLLABORATION AND ENGAGEMENT

We strongly support the focus on transparency in this section, both on decision-making and on an onus on the regulator to “clearly set out the obligations imposed on regulated entities.”

Regulators should also be expected to create a level of trust with industry so there can be discussions about concerns, ideas or questions – this is in line with the last dot point on “innovative approaches....such as ‘regulatory sandboxes.’”

We think there could be stronger performance measures developed for this section. Specifically, we don’t view the example performance measure of a number of workshops as particularly informative, and instead recommend the measures focus on outcomes. For example, feedback from regulated entities and case studies of engagement leading to successful outcomes (such as demonstrated increased understanding of obligations or examples of where a regulator “allow[ed] regulated entities to adopt innovative approaches to meeting their obligations,”) could be beneficial – although noting that the second example requires regulation to be drafted in a way that does not prevent this.

OTHER ELEMENTS OF THE PERFORMANCE FRAMEWORK

Performance reporting

We do have some concerns and questions about the proposed changes to performance reporting. If performance reports are to be rolled into the Annual Report and the Corporate Plan, they should be expected to be included in those documents as unique sections to ensure transparency. These reports should also be made to include reporting against the OBPR Guide(s) for developing regulation, including explicit analysis of each new regulatory instrument and use of Regulatory Impact Statements.

Additionally, it appears that this change removes the requirement for a regulator’s self-assessment to be externally validated. While we agree with the addition of/emphasis on ongoing engagement, there should be externally validated assessment of how successful that engagement has been. This validation process should be done collaboratively, for example, it could be done with the regulator’s relevant Department(s) as an additional party, in addition to collecting feedback from regulated entities.

Ministerial Statements of Expectations and Regulator Statements of Intent

We consider it is important to strike a balance in the Government/Regulator relationship, and that regulators should remain independent, applying the law as adopted by Government.

The proposed framework could provide for more consistency, and we recommend prioritising regulatory stability unless there is a demonstrated need for change. For example, the current timeframe of a new statement of expectations “every 2 years or on change of Minister” will likely be far too often, creating extra work and confusion for both the regulators

and impacted industries. One possibility is to have updated Statements of Expectations less often, but have more regular engagement with Government providing feedback on their views of how the regulator is following these principles.

Implementation

We would like to see some additional clarity on how this Guide will be implemented and performance verified. For example, as the "performance measures" given in the paper are only examples, it would be good to have some clear expectations on how performance measures would be developed for each regulator. We consider that there should be an expectation that performance measures are developed through consultation, and transparently reported against.



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